INDEX

CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 406

RED BALL MOTOR FREIGHT, INC., ET AL., *Appellants*,

v.

EMMA SHANNON AND RICHARD J. SHANNON, d/b/a E. AND R. SHANNON, *Appellees*.

On Appeal from the United States District Court for the Western District of Texas, San Antonio Division

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BRIEF FOR THE APPELLANTS*

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas (R. 163-167) was handed down on April 24, 1963, and is reported at 219 F. Supp. 781. The report and order of the Interstate Commerce Commission (R. 17-38) is dated August 3, 1959, and appears at 81 M.C.C. 337.

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* Appellants are listed in Appendix A.

JURISDICTION

The judgment of the District Court (R. 168-169) was entered on May 1, 1963, and notice of appeal was filed in that Court by these appellants (R. 170-174) on June 27, 1963. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and is sustained by the following decisions: *American Trucking Assns. v. United States, I.C.C.*, 364 U. S. 1 (1960); *Interstate Commerce Com. v. J-T Transport Co.*, 368 U. S. 81 (1961); and *United States v. Drum*, 368 U. S. 360 (1962). Probable jurisdiction was noted on November 12, 1963, and the case was consolidated with No. 421, an appeal from the same judgment by the United States and the Interstate Commerce Commission.

STATUTE INVOLVED

In a very real sense this case involves the entire Interstate Commerce Act for there is at issue here the right, power, and duty of the Interstate Commerce Commission to bring to bear upon a particular factual situation its informed judgment in order to accomplish its assigned task of administering the Act so as to develop, coordinate, and preserve a national transportation system. More particularly, there is here involved Part II of the Act (the Motor Carrier Act of 1935, as amended) for the specific factual situation involves transportation by motor vehicle and the ultimate determination to be made is whether or not that transportation is subject to Commission regulation.

The provisions of the Act which are particularly pertinent are as follows:

National Transportation Policy, 49 U. S. C., preceding §§ 1, 301, 901, and 1001:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with the view of carrying out the above declaration of policy.

Section 203(c), 49 U. S. C. § 303(c), prohibiting for-hire transportation except as authorized by the Interstate Commerce Commission:

> Except as provided in section 202(c), [transportation within terminal areas] section 203(b), [specific partial exemptions] in the exception in section 203(a)(14), [express companies] and in the second proviso of section 206(a)(1), [repealed, P. L. 87-805, 76 Stat. 911] no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any

public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

Section 203(a)(14), 49 U. S. C. § 303(a)(14), defining the term "common carrier by motor vehicle":

The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

Section 203(a)(15), 49 U. S. C. § 303(a)(15), defining the term "contract carrier by motor vehicle":

The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continued period of time to

the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 203(a)(17), 49 U. S. C. § 303(a)(17), defining the term "private carrier of property by motor vehicle":

The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle," who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

Section 206(a), 49 U. S. C. § 306(a), requiring a common carrier by motor vehicle to hold a certificate of public convenience and necessity:

Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations * * * *

Section 209(a), 49 U. S. C. § 309(a), requiring a contract carrier by motor vehicle to hold a permit:

Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive

jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business * * * *

Section 204(c), 49 U. S. C. § 304(c), authorizing the Commission to determine whether the provisions of Part II of the Act are being violated:

> Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of the opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

QUESTION PRESENTED

Whether the District Court may, without reference to applicable statutory provisions, set aside a Commission determination as to the nature of a transportation operation on the ground of lack of substantial evidence where there is no essential dispute as to the facts and where the court substituted its judgment for the Commission's as to the inferences to be drawn from the facts in light of the controlling statute.

STATEMENT OF THE CASE

This case arose upon the institution by the Commission on its own motion (R. 55) of an investigation of appellees' transportation operations for the purpose of determining whether those operations, or any part thereof, constitute unauthorized for-hire transportation or whether they are within the scope and in furtherance of a primary business (other than transportation) and thus constitute bona fide private carriage. After hearing, and upon consideration of undisputed evidentiary facts the Commission found and concluded that appellees were engaging in for-hire transportation of sugar in interstate commerce without appropriate authority and ordered them to cease and desist from such transportation activity. Upon suit by appellees the District Court, without reference to Section 203(c) of the Interstate Commerce Act, concluded that the Commission's decision was not supported by substantial evidence and set aside the Commission's order. From that judgment this appeal has been taken as has the appeal by the United States and the Commission in No. 421.

Appellants (listed in Appendix A) are authorized motor common carriers of property, railroads, and two associations of motor common carriers. They were permitted to intervene in support of the Commission order in the court below pursuant to the provisions of 28 U. S. C. § 2323. (R. 49, 161, 165). As originating or connecting lines the appellant common carriers are engaged in hauling sugar in the area of appellees' sugar transportation operations, and as common carrier members of the National Transportation System appellants have a vital interest in the interpretation and enforcement of those provisions of the Act which

are specifically intended to protect them from unauthorized competition.

The facts of the case as presented at the oral hearing are not in dispute, are relatively uncomplicated, and may be summarized rather easily. However, inasmuch as the Court below predicated its judgment on a conclusion that the Commission's decision is not supported by substantial evidence these appellants here set forth the statement of facts appearing in the Commission's report, 81 M. C. C. at pages 341-343 (R. 23-25), with the addition of record references to evidence supporting the factual statements:

> "The facts pertaining to the business activities and transportation engaged in by the Shannons are as follows: E. and R. Shannon, with headquarters and a warehouse at San Antonio, have been engaged as a partnership in the business of buying and selling livestock since 1934, and in connection therewith have transported livestock as a bona fide private carrier. [R. 67, 68, 106, 107, 110] In or about 1951 their activities were expanded to include the purchase and resale of grain, fertilizer, molasses, and salt, and in 1954, of sugar. [R. 107] They operate seven trucks which are used in connection with some deliveries to customers of the commodities in which they deal. [R. 97, 99] On shipments of livestock and some other commodities (not including sugar) they use common carriers to some extent but have never used for-hire carriage for the transportation of sugar. [R. 115-116] No one questions but that the primary business of the Shannons is that of a dealer in livestock and related items above named except sugar, and that the transportation by them of all of the named commodities, except sugar, is primarily in furtherence of their main or principal business. [R. 67, 76] In dealings

which correspond with movements of livestock transported to destinations in southern Louisiana, the Shannons have been purchasing sugar, in 100-pound bags, from a refinery at Supreme, La., and transporting and selling it to purchasers, the majority of whom are located in San Antonio. [R. 67, 83-84, 111-113] The distance from Supreme to San Antonio is 525 miles. [R. 69] All purchases from the refinery are made on credit, subject to a 2-percent discount if payment is made within 10 days, and the sales by the Shannons at San Antonio are made on the same terms. [R. 84, 91-93, 109]

"An investigation by the Commission's district supervisor indicates that the sugar transported by the Shannons is customarily loaded at the refinery, moved directly and unloaded at the place of business of the purchaser, although sometimes loads are delivered to the Shannons' warehouse in San Antonio and subsequently sold to users in small lots of from 1 to 25 bags. [R. 68] At the hearing the dominant partner maintained that the sugar transported is never sold until after it has left Supreme and is en route to San Antonio; but there are some contrary indications of record, and it is clear that whenever sugar transportation is not coordinated with an appropriate backhaul, it is transported to fill an order obtained in advance. [R. 110-112] On one occasion the Shannons were forced to use a public warehouse for a truckload of sugar because of space limitations of their own warehouse and, generally, the record suports a finding that sugar sales usually are made by the Shannons after it is en route or has arrived at their warehouse. [R. 81-82, 109-111]

"Based on the going market price, a bona fide dealer at San Antonio will normally realize a profit of from 25 to 35 cents per hundred pounds of sugar. [R. 103] The Bureau submitted an exhibit

covering 15 truckloads of sugar transported by the Shannons from Supreme to San Antonio during the period from May to August 1956, on which the net profit to them, based upon the difference between the price paid at Supreme and that received at San Antonio, including transportation, ranged from 27 to 47 cents a hundred pounds, and averaged 35.74 cents per hundred pounds. [R. 60-61, Ex. 1, R. 62, 117-118] The Bureau argues that the profits realized by the Shannons from their sugar sales and those realized by bona fide sugar dealers at San Antonio are not directly comparable because the former are computed without regard to transportation costs whereas the latter necessarily allow for such costs. Compared to the Shannons' average profit of 35.74 cents per hundred including transportation, the record indicates that the applicable rail carload and motor truckload rates on sugar moving from and to the same point is 69 and 109 cents per hundred pounds, respectively. [Ex. 2, R. 62-63, 119-122; Ex. 3, R. 64, 122-126] The 15 truckloads listed by the Bureau were resold in San Antonio within from 1 to 2 days after their pickup as Supreme. [Ex. 1, R. 62, 117-118] The Shannons' explanation of the rapid turnover is that sugar is highly perishable, being particularly susceptible to damage by dampness; that it is subject to sudden and drastic price fluctuations; and that consequently all dealers make a practice of selling it as quickly as possible in order to forestall any loss. [R. 104-105, 108-109] They frankly admit, however, that the principal reason for purchasing sugar at Supreme is to provide a backhaul in connection with outbound movements of livestock and other commodities from San Antonio and that in order to make a profit on the sugar haul they have to have traffic moving from San Antonio to Louisiana. [111-113]."

On the basis of the foregoing statement of facts the Commission reached its ultimate conclusion with a careful statement of its rationale. In so doing, the Commission discussed the "primary business" test, evolved by it early in motor carrier regulation, as applied in *Lenoir Chair Co. Contract Carrier Application*, 51 M. C. C. 65, and as sustained by this Court in *Brooks Transportation Company Inc., et al.* v. *United States of America, et al.*, 340 U. S. 925. The Commission also discussed the subsequent amendment of Section 203(c) which codified that test as the basis for determining what is or is not bona fide private carriage (R. 25-26). It then said that, as pertinent to this case, (81 M. C. C. at pp. 343-344, R. 26):

> "* * * It is our view that the principal question here, whether considered prior to or subsequent to the amendment of Section 203(c), inasmuch as * * * the Shannons are [not] engaged in transportation as a primary business, is whether the sugar transportation operations of * * * the Shannons are in bona fide furtherance of the primary business of the * * * respondents, on the one hand, or, on the other, are conducted as related or secondary enterprises with the purpose of profiting from the sugar transportation performed."

With full recognition of the ultimate question to be resolved, the Commission analyzed the total body of facts in light of the applicable law. That analysis was carefully stated by the Commission and for purposes of judicial review thereof is itself an important fact. In pertinent part the Commission said (81 M. C. C. at pp. 346-347, R. 29-30):

> "* * * Although there are vague representations of record that the Shannons have transported

sugar from Supreme to some points in Texas on occasions when the shipments were not coordinated with backhauls of livestock or feeds, the dominant partner, in discussing such movements describes such a situation as one wherein they had an order, made a special trip to Supreme, and got 'more' money for hauling the particular load of sugar handled under the arrangement. This situation in itself constitutes for-hire carriage within the doctrine of *Jay Cee Transport Co. Contract Carrier Application*, 68 M. C. C. 758, which holds, in part, that in a situation where a person actually does nothing but transport commodities from its suppliers to the users thereof, the fact that the person takes title to the goods is not sufficient to establish the person's status as a private carrier. The more usual arrangement under which they operate, however, appears to be one in which the Shannons have no preexisting sugar order, but buy with the intention of selling later either en route or after the transportation is accomplished. This procedure is ordinarily coordinated with a backhaul, and the purpose of their sugar dealings is the generation of sugar shipments which they can transport as return lading for their trucks which are moving in the opposite direction. We are satisfied that the purpose of their buying and selling sugar and the transportation thereof from Supreme to certain points in Texas is to reduce the cost of transporting other commodities outbound from San Antonio. Such reduction in the cost of transportation of the other commodities constitutes profit from the transportation of sugar from Supreme to the Texas points, and we are convinced that the sugar transportation engaged in by the Shannons is undertaken for the purpose of profiting from the transportation as such. Inasmuch as their transportation of sugar makes their transportation of other commodities in the opposite direction more profitable, to this extent, it

> is an enterprise which has an indirect relation to the primary noncarrier business in furtherance of which their transportation of other commodities is performed. But it can, at most, be considered to be in furtherance of certain lawful private transportation operations of the Shannons, and only secondarily related to their primary business, which, again, is a noncarrier commercial enterprise. Transportation of the considered sugar by the Shannons is, with respect to their primary business of buying and selling livestock and certain other commodities, a related or secondary enterprise conducted with the purpose of profiting from the transportation performed, and, as such, constitutes for-hire carriage for which operating authority from this Commission is required; and we so find."

As will be observed from the foregoing the Commission found that appellees primary non-transportation business did not include dealings in sugar and that the only real relationship between appellees dealing in sugar and its primary business was in the transportation of sugar. The District Court, without any explanation whatsoever, assumed that appellees "* * * are in the business of buying and selling livestock, in the feed mill business, and also buy and sell corn, oats, wheat, bran, molasses, sugar, salt, fertilizers, and everything in the feed line." (219 F. Supp. at p. 782, R. 166) The court gave no consideration whatever to section 203(c), similarly gave no consideration to appellees' primary non-transportation business and the relationship of sugar dealings thereto, but simply recited the relationship between plaintiffs' total assets and expenditures and those for transportation and described in cursory form plaintiffs' dealings in sugar. It then held that plaintiffs' "are in a general mercantile

business buying and selling many items, including sugar." (219 F. Supp. at p. 782, R. 167)

Thus the court below, without consideration of the controlling section of the statute disagreed with the Commission as to the weight to be accorded to and the inferences to be drawn from the undisputed facts and substituted its judgment for that of the Commission on an essentially factual question. To support its action the court declared, without rational explanation, that there is no substantial evidence to support the findings that appellees have been engaged in unlawful transportation of sugar as a common or contract carrier by motor vehicle. (219 F. Supp. at p. 782, R. 167) On review of the decision below it should be carefully remembered that at the oral hearing in this case appellees admitted that their principal reason for purchasing sugar in Louisiana is to provide a backhaul in connection with their outbound movements of livestock and other commodities from San Antonio. (R. 111-113)

SUMMARY OF ARGUMENT

The Interstate Commerce Act constitutes a comprehensive plan for regulation, with certain exceptions, of those engaged in transportation to the end of insuring the availability to the public of a stable, competent, and adequate system of public transportation. While the plan recognizes the right of those engaged in commercial activities other than transportation to perform for themselves the carriage which those activities require, it prohibits them from transporting commodities where the purpose in so doing is to profit from the transportation rather than to directly further their non-transportation commercial activities. Congress has delegated to the Interstate Commerce Commission

the authority to ascertain in each particular case whether a transportation operation is within the scope and in furtherance of a primary non-transportation business or constitutes for-hire carriage which is prohibited in the absence of specific authorization by the Commission.

Congress has recognized the adverse effect upon regulated carriers of transportation performed in avoidance of regulation either in the guise of private carriage or undertaken by otherwise bona fide private carriers for the purpose of enhancing or making more efficient the bona fide private carriage, and twice in recent years has, by amendment to the Act, confirmed the Commission's determination of the limits of bona fide private carriage and the authority of the Commission to enforce those limits. This case presents forsquare a paramount and growing national issue in transportation—the extent to which under the 1958 amendments to the Interstate Commerce Act highway transportation of goods may be conducted by one engaged in a business other than transportation without the necessity of obtaining operating authority therefor.

The Interstate Commerce Commission is empowered to determine whether particular transportation is, in fact, within the scope and in furtherance of a primary business enterprise other than transportation. When the Commission has concluded from an evidential record that an operation is not within the limits of private carriage its conclusion, when based upon substantial evidence, must stand. Here, the facts of appellees' business activities are disclosed on the record.

Appellees as wholesalers at San Antonio, Texas, deal in livestock, grain, fertilizer, molasses and salt, buying and selling these comodities and performing in the

conduct of this business some of their own transportation. Sometimes, after hauling a load of livestock by highway vehicle to Louisiana, they buy and back-haul to Texas a load of sugar. Rarely, if ever, is sugar bought and transported except as a back-haul, and, except in the rarest case, the sugar is sold before it reaches San Antonio. Thus the sugar is not ordinarily warehoused but is delivered directly to the purchaser. The admitted principal reason for buying the sugar in Louisiana is to provide a back-haul on the livestock run. In order to make a profit on sugar there must first be traffic moving into Louisiana.

From its review of the facts the Commission found that appellees' dealings in sugar were not within the scope or in furtherance of their primary non-transportation business but were undertaken for the purpose of profiting from the transportation performed. There being an abundance of evidence to support this finding it was error for the court below to substitute its judgment for that of the Commission. Moreover, it was error for the court below to fail to consider the explicit provisions of the statute as recently amended by Congress delineating the limits of private carriage pursuant to consideration of which the Commission's judgment was reached. Finally, it was error for the court below to fail to recognize the paramount goals of regulation and to consider whether the Commission's decision was in furtherance of the achievement of those goals. It is the task of the Commission to regulate transportation, and when its judgment is within the authority conferred upon it the exercise thereof should be sustained. Otherwise its authority will be seriously undermined and thereby its ability to perform the functions entrusted to it by Congress will be impaired.

ARGUMENT

Court Below Failed to Follow Established Construction of Interstate Commerce Act

The court below at the outset of its opinion made appropriate reference to the jurisdictional and procedural provisions of the United States Code under which the action was brought. It also made reference to the provisions of the Interstate Commerce Act which require that common and contract carriers by motor vehicle held appropriate operating authority and which authorize the Interstate Commerce Commission to conduct investigations to determine whether the Act is being violated. But the court made no reference whatever to any other provisions of the Interstate Commerce Act, gave no consideration to the explicit prohibition contained in the Act against for-hire transportation without operating authority,[1] and failed to recognize the liberal construction of the Act required under the precedent decisions of this Court and a long line of lower Federal Court decisions.[2]

The Interstate Commerce Act is a broad, comprehensive statute which provides for regulation in the public interest of the various modes of surface transportation, i.e., transportation by rail is regulated under Part I, transportation by motor vehicle under Part II, transportation by water under Part III, and freight forwarder transportation under Part IV. Inasmuch

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[1] Section 203(c).

[2] *McDonald* v. *Thompson*, 305 U.S. 263 (1939); *Gregg Cartage & Storage Co.* v. *United States*, 316 U.S. 74 (1942); *Georgia Truck System* v. *Interstate Commerce Com'n*, 123 F. 2nd 210 (5th Cir. 1941); and *Lamb* v. *Interstate Commerce Commission*, 259 F. 2nd 358 (10th Cir., 1958).

as the case at bar involves transportation by motor vehicle the directly applicable statutory provisions are to be found in Part II, although those provisions must be construed in harmony with the entire Act of which they are a part.[3] It is immediately apparent from a reading of Part II and particularly of Sections 203, 206 and 209 (49 U.S.C. 303, 306 and 309) that, with certain specific exceptions, it was intended to and does forbid *all* for-hire transportation by motor vehicle in interstate commerce unless and until proper operating authority is issued by the Interstate Commerce Commission.

The obvious purpose of the Interstate Commerce Act is to maintain an adequate system of transportation made up of economically strong carrier components and to prevent deterioration of the economic strength of those components which would flow from subterfuges and devices designed and maintained to effectuate transportation beyond the pale of regulation. This Court in *United States* v. *Drum*, 368 U. S. 360 (1962), unequivocally confirmed the broad, remedial purpose of Part II of the Act when it said (368 U. S. at pages 373-374):

> "The Motor Carrier Act of 1935 subjected many aspects of interstate motor carriage—including entry of persons into the business of for-hire motor transportation and the oversight of motor carrier rates— to administrative controls, on the premise that the public interest in maintaining a stable transportation industry so required. However, although aware that 'Both [contract carriers and common carriers] . . . are con-

[3] *United States* v. *American Trucking Associations*, 310 U.S. 534 (1940).

tinually faced with actual or potential competition from private truck operation . . . ,' Congress took cognizance of a shipper's interest in furnishing his own transportation, and limited the application of the licensing requirements to those persons who provide 'transportation . . . for compensation' or, under a 1957 Amendment, 'for-hire transportation.' The Commission, therefore, has had to decide whether a particular arrangement gives rise to that 'for-hire' carriage which is subject to economic regulation in the public interest, or whether it is, in fact, private carriage as to which Congress determined that the shipper's interest in carrying his own goods should prevail. This case is a recent instance of the Commission's developing technique of decision."

Though the Act speaks clearly for itself and though this Court has carefully announced its nature and purpose, whenever a decision of the Commission that a particular operation constitutes unauthorized transportation for-hire is challenged, as in the case at bar, sight must not be lost of the Congressional charge that the Act be administered so as

> "* * * to promote safe, adequate, economic, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices; all to the end of developing, coordinating and preserving a national transportation system for water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States * * *."[4]

[4] National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901 and 1001.

And in considering the stated purpose and goals of Congress underlying the regulation of transportation it must be recognized that Congress has also charged the Commission with administering and enforcing all provisions of the Act in light of and consistent with its plain declaration of policy. Indeed, this Court has held that the "policy is the yardstick by which the correctness of the Commission's actions will be measured."[5] Unquestionably, the National Transportation Policy is the overriding, governing factor in cases involving transportation, and especially in cases involving a question as to whether a particular transportation operation is bona fide private carriage or is unauthorized for-hire transportation.

In view of the broad public interest in regulated transportation as expressed in the Act, the policy, and decisions of this Court, it is fundamental that any plan, scheme, or arrangement for engaging in transportation in interstate commerce beyond the scope of regulation must be carefully scrutinized. If the provisions of the Act could be lightly or easily avoided by imaginative plans, schemes, or arrangements, the purpose of regulation would be thwarted. Many decisions have recognized the validity of this premise but perhaps the principle has never been better expressed than by the Court of Appeals for the 5th Circuit in *Georgia Truck System* v. *Interstate Commerce Com'n.*, 123 F. 2nd 210, 212 (1941), when the Court said:

> "* * * In the argument much refinement was indulged in, much speculation was raised, many authorities cited, as to how close one might approach

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[5] *Schafer Transportation Co.* v. *United States*, 355 U.S. 83, 88 (1957).

> the line of transportation without being regarded as having stepped over it. We need not indulge here in any of these refinements. It is sufficient for us to say that the invoked statute is a highly remedial one, that its terms are broadly comprehensive enough to bring within them all of those who, no matter what form they use, are in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire * * * "

The particular question in the case at bar is the status in law of the transportation of sugar by appellees from Supreme, Louisiana, to San Antonio, Texas. Stated otherwise, the question is whether that operation is bona fide private carriage within the definition thereof,[6] or constitutes prohibited for-hire transportation under other provisions of the Act.[7]

Many years ago it was recognized that in scrutinizing a transportation operation to determine its status under the law the provisions for private carriage must be treated as in the nature of an exemption from a remedial statute. Thereby it was recognized that surface appearances or the good-faith intent of the operator must be disregarded in favor of a determination of what in substance is being accomplished and the effect thereof upon the Congressional plan for transportation regulation. For instance, in *Interstate Commerce Com'n* v. *A. W. Stickle & Co.*, 41 F. Supp. 268, 272-273

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[6] Section 203(a)(17).

[7] Particularly the explicit prohibition of Section 203(c), and the requirements that operating authority be held by common and contract carriers as set forth in Sections 203(a)(14), 203(a)(15), 206(a), and 209(a).

(E. D., Okla. 1941), aff'd 128 F. 2nd. 155, cert. den. 317 U. S. 650, the Court said:

> "* * * The definitions of the three types of carriers must be read and considered together when classifying a carrier under a given state of facts. It must be assumed that Congress in defining a private carrier did not attempt thereby to afford a means or device whereby one might evade the provisions applicable to common or contract carriers. Yet *approval of the Company's activities in this case as being those of a private carrier would afford an opportunity for many persons operating as common carriers or contract carriers to evade such a classification by the simple expedient of becoming commission merchants and acting as intermediaries between the wholesaler and his retail trade.* It is the effect of the plan, of what is actually being done, rather than the designation of it by the person concerned or his good faith in endeavoring to engage in the transportation business as a private carrier, that is to govern if the beneficial results intended by the Act are to be attained." (Emphasis added)

Very recently, this Court in reviewing a District Court decision which had set aside a Commission determination that particular transportation operations were unauthorized for-hire transportation rather than bona fide private carriage, in substance reaffirmed the principles for interpretation and application of the Interstate Commerce Act set forth in the *Stickle* case. In *United States* v. *Drum*, supra, the Court in the most commanding language said (368 U. S. at pages 375-376):

> "* * * The statutory requirement that a certificate or permit be issued before any new for-hire carriage may be undertaken bespeaks con-

gressional concern over diversions of traffic which may harm existing carriers upon whom the bulk of shippers must depend for access to market. Accordingly, the statutory definitions, while confirming that a shipper is free to transport his own goods without utilizing a regulated instrumentality, at the same time deny him the use of 'for compensation' or 'for-hire' transportation purchased from a person not licensed by the Interstate Commerce Commission. *Because the definitions must, if they are to serve their purpose, impose practical limitations upon unregulated competition in a regulated industry, they are to be interpreted in a manner which transcends the merely formal.* From the outset the Commission has correctly interpreted them as importing that a purported private carrier who hires the instrumentalities of transportation from another must—if he is not to utilize a licensed carrier—assume in significant measure the characteristic burdens of the transportation business. *The problem is one of determining—by reference to the clear but broad remedial purpose of a regulatory statute committed to agency administration—the applicability to a narrow fact situation of imprecise definitional language which delineates the coverage of the measure.* * * * " (Emphasis added)

It is eminently clear that judicial review of a Commission determination of the nature of a transportation operation must be limited by the terms of the statute and the purposes it was designed to fulfill. The error of the court below lies primarily in its failure to consider the applicable provisions of the Act. Before proceeding to demonstrate that error in detail, however, it will be well to discuss Section 203(c) in light of events which brought about its enactment in order to clearly establish its meaning, purpose, and applicability to the facts of the case at bar.

Settled Standard for Distinguishing Between Bona Fide Private Carriage and For-Hire Carriage

The critical issue presented to the Commission for resolution in the instant proceeding was whether certain operations of the appellees in the transportation of sugar were unlawful transportation for-hire or whether they constituted bona fide private carriage. The issue itself is not novel but, on the contrary, is one that has been repeatedly raised before both the Commission and the Courts. From the earliest days of motor carrier regulation the Commission has been faced with the necessity of determining whether transportation operations as disclosed by varying fact situations constituted private carriage beyond the scope of economic regulation or for-hire transportation subject to all relevant provisions of the Act.

In the administration and enforcement of the Act the Commission at the outset of motor carrier regulation evolved what has come to be known as the "primary business" test, and has consistently applied that standard ever since.[8] The most authoritative statement of the "primary business" test by the Commission is that found in *Lenoir Chair Co. Contract Carrier Application*, 51 M. C. C. 65 (1949), where the entire Commission, after oral argument, said (page 75):

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[8] See, *Carpenter Common Carrier Application*, 2 M.C.C. 85 (1937); *Congoleum—Nairn, Inc., Contract Carrier Application*, 2 M.C.C. 237 (1937); *Howrigan Contract Carrier Application*, 11 M.C.C. 455 (1939); *Swanson Contract Carrier Application*, 12 M.C.C. 516 (1939); *Spankake Common Carrier Application*, 21 M.C.C. 258 (1939); *Dugan Extension of Operations—Nebraska Points*, 26 M.C.C. 233 (1940); and *Woitishek Common Carrier Application*, 42 M.C.C. 193 (1943).

"* * * * * If the facts establish that the primary business of an operator is the supplying of transportation for compensation then the carrier's status is established though the operator may be the owner, at the time, of the goods transported and may be transporting them for the purpose of sale. Numerous cases involving operations of this character could be cited. If, on the other hand, the primary business of an operator is found to be manufacturing or some other noncarrier commercial enterprise, then it must be determined whether the motor operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed. In our opinion, they cannot be both. A finding that a company is engaged in performing transportation for compensation with a purpose of profiting therefrom is inconsistent with and precludes a finding that the motor operations are conducted in bona fide furtherance of its other and primary commercial enterprise."

As enunciated in the *Lenoir Chair* case the "primary business" test was approved by this Court in *Brooks Transportation Company Inc., et al. v. United States of America, et al.*, 340 U. S. 925 (1951), in a per curiam decision affirming the judgment of a three-judge statutory court in *Brooks Transp. Co. v. United States*, 93 F. Supp. 517 (1950), which had affirmed the decision of the Commission in the *Lenoir Chair* case. It will be observed that the decision of this Court in *Brooks* was handed down in 1951, some six years *prior* to the Commission's hearing in the case at bar. *Subsequent* to that hearing, and at the request of the Interstate Commerce Commission as well as others interested in the development of an adequate transportation system,

the "primary business" test was expressly written into the Interstate Commerce Act by Congress.[9]

The striking similarity between the now effective language of Section 203(c) and the "primary business" test consistently applied by the Commission and approved in the *Brooks* case cannot fail to be noted. On its face the provision reveals that it is nothing more than the statutory embodiment of the time-tested standard long ago developed by the Commission. In addition, however, Congress, in adopting the "primary business" test in 1958 clearly specified its purpose and delineated some of the situations which the new statutory prohibition was intended to embrace.

Congressional Intent Underlying Adoption of Primary Business Test Embraces Precise Fact Situation Here

Seldom has a statutory provision come before this Court for the first time in a case where the legislative history of the provision makes it so unequivocally clear that the statute was intended to and does apply to the fact situation present in the case. The regulatory problem which caused the Interstate Commerce Commission to seek additional legislation, the agreement of Congress that the problem should be corrected, and the specific purpose of Congress in the legislation approved is well set out in the report of the Committee on Interstate and Foreign Commerce of the United States Senate recommending passage of the amendment to Section 203(c) where the Committee, *inter alia*, said (S. Rpt. No. 1647, 85th Congress, 2nd Sess. excerpt

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[9] P. L. 85-625, approved August 12, 1958, amending Section 203(c), [49 U.S.C. 303(c)], 74 Stat. 574.

attached as Appendix A to report of Commission, 81 M. C. C. at pp. 348-350, R. 31-34):

"A matter of serious concern to the subcommittee is the growing practice of persons engaging in the commercial transportation of property by motor vehicle under circumstances that do not constitute bona fide private carriage, as that term is properly understood, but that nonetheless enable them to evade the economic regulation to which common and contract carriers by motor vehicles are subject even though the transportation services performed are not specifically exempt from such regulation. Most frequently, perhaps, evasion of the economic regulation to which it is intended that all for-hire carrier transportation of property other than that specifically exempted shall be subject is accomplished under the guise of private carriage.

* * * *

"*Various subterfuges are employed to evade economic regulation and avoid imposition of the transportation excise taxes. * * * Another is the backhaul method of operation increasingly engaged in by concerns that deliver in their own trucks articles which they manufacture or sell and then purchase merchandise at or near their point of delivery for transportation back to a point near their own terminal for sale to others,* or where they transport property they do not own, such transportation being performed only for the purpose of receiving compensation for the otherwise empty return of their trucks.

"There are numerous variations but, whatever the precise nature of the subterfuge employed, carriage of this sort undermines the strength of the regulated for-hire carriers and in so doing it also injures the public which is largely dependent upon regulated for-hire carriage for its trans-

portation requirements. *Protection is needed from destructive competition of this kind.*

* * * *

"In the first session of the present Congress (Public Law 85-163, approved August 22, 1957) the Interstate Commerce Act was amended to prohibit one (except as otherwise specifically provided) from engaging in any 'for-hire transportation business by motor vehicle' in interstate or foreign commerce without a certificate or a permit authorizing such transportation. This prohibition is expected to prove helpful in correcting certain of the abuses described, but it appears that loopholes may still remain. What is needed, in the opinion of the subcommittee, is a further prohibition to the effect that no person in any commercial enterprise other than a duly authorized or specifically exempt for-hire transportation business shall transport property by motor vehicle in interstate or foreign commerce unless such transportation is solely within the scope and in furtherance of a primary business enterprise (other than transportation) of such person.

"With the Interstate Commerce Act amended in this way commercial highway transportation of property in interstate or foreign commerce would, with certain specific exemptions, be required to fall into one or another of three classes: (a) duly certificated common carriage, (b) duly permitted contract carriage, or (c) transportation solely within the scope and in furtherance of a primary business enterprise (other than transportation) of the transporter. Other commercial highway transportation, except as specifically provided would be prohibited. This, it is believed, would serve to correct most of the abuses that have arisen in the name of private carriage and yet would not in any way jeopardize or interfere with what might be called legitmate or bona fide private

carriage. Indeed, the 'primary business test' contained in Brooks Transportation Co. v. U. S. (340 U. S. 925 (1951)), so sacrosanct to the private carriers and deemed by them essential to their best interests and the preservation of their rights, would be written directly into the statute." (Emphasis added)

Equally as clear as the intended adoption of the "primary business" test is the concern of Congress with the problem of backhaul transportation.[10] That is, the problem of the bona fide private carrier transporting its own goods in one truck and then purchasing goods for backhaul transportation to be sold in the vicinity of the origin of the bona fide private carriage. In this situation it is perfectly plain that the sole purpose of the purchase and sale of the backhaul goods is to utilize motor-vehicle capacity on the return movement and that the only relationship between dealings in such goods and the bona fide primary business of the operator lies in the transportation thereof. This is what Section 203(c) as amended was intended to prohibit and this is precisely what the Commission found appellees in the case at bar to be doing.

The Committee on Interstate and Foreign Commerce of the House of Representatives was equally as explicit in recommending passage of the amendment to Section 203(c). That Committee said, *inter alia*

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[10] The concern was observed by this Court in *United States* v. *Drum*, supra, p. 375, at footnote 12, in these words:

"That concern has found recent legislative expression in a 1958 amendment designed to curb so-called 'buy-sell' evasions by purported or 'pseudo' private carriers. * * * See S. Rep. No. 1647, 85th Cong. 2d Sess. 23-24; H.R. Rep. No. 1922, 85th Cong. 2d Sess. 17-19."

(H. Rpt. No. 1922, 85 Cong., 2nd Sess., excerpt attached as Appendix B to Commission report, 81 M. C. C. at pp. 350-351, R. 34-37):

"The erosion of traffic of regulated carriers has also been caused to a considerable extent by the growth of 'pseudo-private carriage' by truck. * * *

"*In addition, business* [sic] *which use their own trucks to deliver their own merchandise, are purchasing goods at or near the final point of delivery of their own merchandise, and transporting such goods to places near their own establishments for sale to others. Such transportation is usually performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture.* In other instances, prearranged plans are set up in order that the real consignee may receive transportation at a reduced cost.

"*The pseudo-private carriage is a subterfuge for engaging in public transportation without complying with the certificate or permit requirements of the Interstate Commerce Act.* It constitutes a growing menace to shipper and carrier alike, and is not in the public interest. It is injurious to sound public transportation. It promotes discrimination between shippers and threatens the existing rate structures of regulated carriers. It makes possible the avoidance of payment of the Federal transportation of property tax, for this tax is not levied on the transportation of property owned by the carrier.

* * * * *

"In the Brooks case, the Supreme Court recognized the so-called primary business test as the governing criterion in establishing bona fide private carriage. Under the doctrine, if transportation is performed in furtherance of the primary

business of the operator, even though a charge may be made for such service, the transportation is treated as bona fide private carriage. If, however, a bona fide noncarrier business is not established, the transportation is treated as for-hire.

* * * *

"Under these circumstances several witnesses recommended, and this committee favors, the further amendment to section 203(c) of the act contained in section 7 of the reported bill. This amendment provides that no person shall, in connection with any other business enterprise, transport property by motor vehicle in interstate or foreign commerce unless such transportation is incidental to, and in furtherance of, a primary business enterprise (other than transportation) of such person. There is no intention on the part of this committee in any way to jeopardize or interfere with bona fide private carriage, as recognized in the Brooks case." (Emphasis added)

A fair reading of the report of both committees of Congress indicates the legislative view that backhaul transportation which is at best only incidentally related to the primary noncarrier enterprise should not be permitted within the scope of legitimate private carriage. Both Committees considered such arrangements as a subterfuge for the purpose of engaging in for-hire transportation beyond the pale of regulation, and both committees clearly expressed their belief that such subterfuges were violations of the Interstate Commerce Act. And the 1958 amendment has been held to have been effective to accomplish the Congressional purpose. In *Church Point Wholesale Bev. Co.* v. *United States*, 200 F. Supp. 508 (W.D. La. 1961) a three-judge statutory court affirmed a decision of the Interstate Commerce Commission that sugar transpor-

tation under facts remarkably similar to the case at bar constituted unauthorized for-hire carriage. After reviewing the legislative history of Section 203(c) as amended in 1958, the three-judge court concluded (200 F. Supp. at page 517):

> "Plaintiffs' transportation of sugar to Midwest destinations in order to be lawful, since it is unauthorized, must be within the scope and in furtherance of their primary business as distributors at wholesale of groceries, liquor and beer within Louisiana. The relationship between the two distinct operations is tenuous at best. While the northbound transportation of sugar reduces the allocation of round-trip costs assignable to the merchandise picked up for wholesale distribution in Louisiana, this economic benefit accruing to the noncarrier business enterprise of the plaintiffs is too remote to place such transportation within the regulatory exemption afforded private carriage by the Act. But for the mechanics of assuming title to the sugar they transport, there would be no question that the plaintiffs are engaged in for-hire carriage in their northbound transportation. They concede that they handle the sugar for the profit accruing therefrom. That such transportation additionally achieves certain economies and efficiencies beneficial to the plaintiffs' wholesaling activities is not controlling. *Plaintiffs' justification of their northbound transportation would make a nullity of the primary business test expounded by the Commission, sustained by the courts and ratified by the Congress in the enactment of Section 203(c) of the Act, for it would permit any person engaged in any other business enterprise to transport property by motor vehicle, irrespective of whether such transportation is, in fact, within the scope or in furtherance of such person's primary business enterprise, if the performance of the transportation makes possible*

more profitable utilization of the equipment used in the primary business enterprise." (Emphasis added)

In spite of the fact that the report of the Commission discussed the "primary business" test and the enactment of Section 203(c), and in spite of the fact that the significance of this long-standing test and its codification by Congress was argued in the court below by the parties the court chose to utterly disregard this applicable law. Manifestly, Section 203(c), as amended, was intended to embrace the precise fact situation present in this case. In refusing to recognize this the court exceeded the permissible bounds of judicial review and erroneously set aside the decision of the Interstate Commerce Commission.

Court Below Failed to Consider Purpose and Requirements of Statute and Erroneously Substituted Its Judgment for That of the Commission

The failure of the court below to consider the controlling principles and provisions of law, i.e., the standard for distinguishing between private carriage and for-hire carriage as established in case law and as codified in 1958, is readily apparent from the opinion of the court where no reference whatever to the distinction or the criteria for determining the nature of a particular operation appears. In setting aside the decision of the Commission, it is plain that the court applied an improper standard for it failed to treat with the relationship between appellees' dealings in sugar and their livestock and feed business. Rather, the court assumed, without explanation and in contradiction of the express findings of the Commission, that appellees were engaged in a single business enterprise which included dealings in sugar. The court then com-

pared the assets and expenditures of appellees devoted to transportation with those devoted to non-transportation activities and concluded that transportation was not a significant part of the total. On the strength of this conclusion, coupled with the fact that in appellees' transportation of sugar there is no specific charge for transportation identifiable as such and no apparent holding out to transport for the general public, the court reiterated its initial assumption to the effect that appellees are engaged in a general mercantile business including the buying and selling of many items including sugar. With this as a predicate the court went on to state that there is no substantial evidence to indicate that appellees were transporting sugar as common or contract carriers by motor vehicle and that the Commission in finding them engaged in unauthorized transportation for-hire had exceeded its lawful authority.

When the decision of the court below is contrasted with the careful statement of facts and the thorough analysis of those facts in the Commission's report it is apparent that the court below has vastly exceeded the permissible limits of judicial review as laid down by this court in numerous decisions. Thus, in *Georgia Pub. Serv. Commission* v. *United States*, 283 U.S. 765, 775 (1931), this Court said:

> "* * * It is not our province to inquire into the soundness of the Commission's reasoning, the wisdom of its decisions, or the consistency of its conclusions with those reached in similar cases. * * *"

And in *Merchants Warehouse Co.* v. *United States*, 283 U.S. 501, 508 (1931), this Court held:

> "* * * The credibility of witnesses and weight of evidence are for the Commission and not for the

courts, and its findings will not be reviewed here if supported by evidence. * * *"

Similarly, in *Swift & Co.* v. *United States,* 343 U.S. 373, 382 (1952), this Court said:

"Whether [a system of operation is proper] * * * is a question committed to the administrative judgment of the Commission. When that judgment is based on findings abundantly supported by the evidence on the whole record, as it is in this case, it is the duty of the courts to sustain it. * * *"

Demonstrative of the error in the case at bar is the fact that the court below apparently did not credit the evidence supporting the Commission's findings, for it summarized only that portion of the evidence which the court believed tended to support the court's contrary conclusion. Thereby, the court breached the principle embodied in this court's statement in *Chicago, St. P. M. & O. R. Co.* v. *United States,* 322 U.S. 1, 2-3 (1944) where the following appears:

"* * * The court below examined the evidence as to each challenged finding and found each 'not unsupported by evidence.' It declined, quite properly, to substitute inferences of its own for those drawn by the Commission from testimony and declined to weigh anew conflicts in it. This was no error, and we affirm the findings. * * *"

Not only did the court below improperly declare the Commission's findings to be lacking in substantial evidential support without an examination of the evidence, but also it compounded its error by substituting its judgment for that of the Commission on a question peculiarly committed to that agency. Just as a finding that a rate or practice is unreasonable is a determina-

tion of fact to be made by the Commission,[11] and just as the question of whether preference or discrimination is undue or unjust is ordinarily left to the Commission for determination as a question of fact,[12] so, too, is the question of determining whether a particular transportation operation is bona fide private carriage or unauthorized for-hire carriage a matter committed to the Commission for determination as an essentially factual question.

Speaking of the status which a reviewing court should accord to a Commission decision in *East Texas Lines* v. *Frozen Food Express*, 351 U.S. 49, 54 (1956) this court said:

> "The Commission is the expert in the field of transportation. And its judgment is entitled to great deference because of its familiarity with the conditions in the industry which it regulates. * * *"

And of greater significance to the instant case is the proposition that where the Commission's decision is supported in evidence a reviewing court should sustain that decision even though on the basis of the evidence it might have reached a different conclusion. In *Swayne & Hoyt* v. *United States*, 300 U.S. 297, 304 (1937), the proposition was explicitly stated when this Court said:

> "Such determinations [of fact by the I.C.C. or Shipping Board] will not be set aside by courts if there is evidence to support them. Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not au-

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[11] *Virginian R. Co.* v. *United States*, 272 U.S. 658, 665 (1926).

[12] *Nashville, C. & St. L. R.* v. *Tennessee*, 262 U.S. 318, 322 (1923).

thorized to substitute its own for the administrative judgment. * * *"

The failure of the court below to consider the established standard for determining the nature of transportation operations, its failure to consider the evidence supporting the Commission's findings, and its substitution of judgment for that of the Commission suggest that the court fell into the same error as did the District Court in *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535-536 (1946). There, in reversing the lower court this Court clearly delineated the proper limits of judicial review of an Interstate Commerce Commission decision when it said:

> "We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true as the opinion stated, that '* * * the courts must in a litigated case be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

As stated above, the court below glossed over evidentiary facts recited and considered by the Commis-

sion, and, in reaching its conclusion the court overlooked the careful sifting and weighing of evidence disclosed in the Commission report. It is significant that the transportation and related handling of sugar by appellees did not begin until 1954, some three years after the addition of other commodities naturally related to appellees' feed and livestock business had ceased. Further, while appellees sometimes use the services of common carriers, both rail and motor, for the transportation of the other commodities in which they deal, sugar alone is *always* transported in appellees' own vehicles. And such transportation *always* corresponds with outbound movements of livestock transported by appellees from Texas to points in southern Louisiana, near Supreme, the origin of the sugar movements.

It is important too, that the length of the sugar haul from Supreme to San Antonio is 525 miles. An outbound movement of 525 miles where the dealing in feed and livestock is unquestionably a primary non-transportation business is an integral set of economic facts. Whether the highway vehicle will return empty for the entire 525 miles, or whether it will be utilized to transport sugar in order to reduce the cost of the round-trip movement presents a different set of economic facts. And to this distinction the Commission attached importance for clearly this is the back-haul situation which Congress considered as pseudo private carriage and intended to prohibit by Section 203(c) as amended in 1958.[13]

The foregoing facts are not exhaustive of those weighed by the Commission. For instance, the Com-

[13] See Appendices A & B to Commission Report, 81 M.C.C. at pp. 348-351, R. 31-37.

mission also considered the fact that sugar is customarily loaded at the refinery, moved directly to and unloaded at the place of business of the purchaser. In the infrequent situations when sugar is transported to appellees' warehouse it is sold, not in truckload lots, but in quantities varying from 100 pounds to 2500 pounds. And in those instances when the transportation of sugar is not coordinated with an outbound movement of livestock it is transported to fill an order obtained in advance *and for more money.* The Commission also considered, as the court did not, appellees' frank admission that the principal reason for purchasing sugar at Supreme is to provide a back-haul in connection with outbound movements of livestock and other commodities from San Antonio and that in order to make a profit on the sugar haul it is necessary to have the outbound movements from San Antonio to Louisiana.

While the court below related a few of the facts considered by the Commission it completely overlooked the picture disclosed by the facts as a whole. It is for the Commission to consider and weigh the evidence and to draw factual conclusions therefrom and those conclusions are not to be overturned when there is evidence supporting them even though a court considering the matter *de novo* might have reached a different conclusion. As this Court said in *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65 (1945), the Commission is clothed with broad discretionary power "to draw its conclusions from the infinite variety of circumstances which may occur in specific instances." Certainly, it is error for a reviewing court to set aside a decision of the Commission upon consideration by the court of isolated fragments

of evidence where the Commission's own report discloses consideration of all the evidence. As was said by this Court in *United States* v. *Drum*, supra (368 U.S. at page 384):

> "* * * *We deal in totalities; indicia are instruments of decision, not touchstones. The Commission allowably dealt with this novel situation as an integral and unique problem in judgment, rather than simply as an exercise in counting commonplaces. Nor did it leave the basis for its decision unarticulated.*" (Emphasis added)

Commission Consideration Flows Logically From Facts and Is In Furtherance of Congressional Policy

The nature of the business and the operations conducted pursuant thereto by the appellees are clearly established of record. It is virtually beyond dispute that appellees transport sugar solely for the purpose of securing a payload for vehicles which would otherwise return empty to San Antonio. To secure sugar for transportation appellees purchase it from the refinery in Supreme and sell it to buyers in the San Antonio area. The period between the purchase by appellees and the sale by appellees is extremely short, usually one or two days, and the total transaction is usually completed while the sugar is enroute from the refinery to San Antonio. Except in a very few instances the sugar as a general proposition is delivered directly to the San Antonio purchasers and the only significant function performed by appellees is the interstate transportation from the refinery to the place of business of the ultimate purchaser. They perform no service from which they could reasonably gain a profit except the service of transportation. This is a significant fact supporting the finding that as to the sugar appellees'

primary business is transportation for-hire in interstate commerce.[14]

To properly determine the legal nature of appellees' sugar transportation it is necessary to evaluate the evidence in light of the provisions of Section 203(c) of the Act. This the Court below did not do. That Section prohibits the transportation of property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope and in furtherance of a primary business enterprise, other than transportation, of the operator. That is to say, the commodities transported must have some relationship to a primary non-transportation enterprise other than the transportation itself. Lacking such a non-transportation relationship the transportation of commodities in the reverse direction of bona fide movements in private carriage falls squarely within the situations decried by the Interstate and Foreign Commerce Committees of both the House and the Senate in their reports recommending passage of legislation to codify the "primary business" test.[15]

In the case at bar the Commission found on the basis of the evidence that appellees are engaged in the feed and livestock business. Dealings in sugar for human consumption have no natural relationship to that business and the record discloses that appellees deal in sugar in order to load their vehicles for return movements following outbound shipments of feed and livestock. There is clearly ample evidence to support the

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[14] *Cf. Scott* v. *Interstate Commerce Commission*, 213 F. 2d 300 (10th Cir., 1951).

[15] See Appendices A and B of the Commission report, 81 M.C.C. at pp. 348-351, R. 31-37.

Commission's ultimate conclusion that the transportation of sugar by appellees is unauthorized for-hire transportation.

In view of the mandate of the National Transportation Policy to foster sound economic conditions in transportation and among the several carriers and to encourage the establishment and maintenance of reasonable charges for transportation services, and further in view of the recognition of Congress, the Commission, and the Courts that transportation in evasion of regulation impairs the achievement of the purposes of the Interstate Commerce Act, it is apparent that the conclusion reached by the Commission in the case at bar is in accord with Congressional policy. Equally apparent is the fact that the decision of the court below is not in furtherance of the Congressional policy and would strike a serious blow against the carefully conceived Congressional plan for transportation regulation. As recognized by the court in *Interstate Commerce Com'n* v. *A. W. Stickle and Co., supra,* some twenty-three years ago, approval of activities such as appellees' transportation of sugar would afford an opportunity for persons acting as for-hire carriers to exceed regulation by the simple expedient of becoming commission merchants and acting as intermediaries between producers and their consuming customers. The plain purpose of the primary business test long followed by the Commission and now explicitly approved by Congress and made a part of the Act is to prevent the erosion of traffic from regulated carriage by pseudo-private carriage such as that disclosed on this record.

CONCLUSION

The Court below has declared that the Commission's findings on an essentially factual question committed to the Commission by Congress are not supported by substantial evidence and has substituted its judgment for that of the Commission as to the ultimate conclusion which should be reached. And it has reached this result on the basis of a recital of mere fragments of the evidence without consideration of the evidence as a whole and without consideration of the explicit provisions of the Act which control the determination of what is and is not lawful private carriage. A review of the record as a whole discloses that there is evidence supporting every statement of fact contained in the Commission's report and thereby there is substantial evidence supporting the Commission factual conclusions.

It being apparent that there is substantial evidence supporting the Commission's findings and ultimate conclusion it is clear that the court below committed error in setting aside the Commission's decision for, "so long as there is warrant in the record for the judgment of the expert body it must stand."[16] Moreover, the Commission report discloses a most careful and thorough evaluation of the evidence and sets forth a clear statement of the rationale which led the Commission to its conclusion. Certainly it cannot be said that the basis upon which the Commission proceeded is either undisclosed or unintelligible nor can it be said that the conclusion reached is beyond the Commission's authority in view of the provisions of the Act which Congress has charged it to administer. There-

[16] *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 145-146 (1939).

fore, it is clear that the court below exceeded the permissible limits of its own authority in setting aside the Commission's decision for "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."[17]

WHEREFORE, the appellants listed in Appendix A respectfully pray this Honorable Court to reverse the judgment of the court below and to remand the case with instructions to dismiss the complaint.

Respectfully submitted,

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DATED: February 12, 1964

[17] *Mississippi Valley Barge L. Co.* v. *United States*, 292 U.S. 282, 286-287 (1934).

APPENDIX A

The following intervening defendants in the Court below do hereby participate in this Brief:

(1) Red Ball Motor Freight, Inc.

(2) Brown Express, Inc.

(3) Texas-Arizona Motor Freight, Inc.

(4) Central Freight Lines, Inc.

(5) The Atchison, Topeka and Santa Fe Railway Company

(6) Chicago and North Western Railway Company

(7) Chicago, Burlington & Quincy Railway Company

(8) Chicago Great Western Railway Company

(9) Chicago, Milwaukee, St. Paul and Pacific Railroad Company

(10) Chicago, Rock Island and Pacific Railroad Company

(11) Great Northern Railway Company

(12) Illinois Central Railroad Company

(13) The Kansas City Southern Railway Company

(14) St. Louis-San Francisco Railway Company

(15) Soo Line Railroad Company

(16) Union Pacific Railroad Company

(17) Wabash Railroad Company

(18) The Western Pacific Railroad Company

(19) Texas Tank Truck Carriers Association, Inc.

(20) Regular Common Carrier Conference of American Trucking Associations, Inc.